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Regulating the Referendum on Scottish Independence



The referendum on independence is still almost 13 months away and already most attention is focused on major substantive issues such as economic relations between an independent Scotland and the United Kingdom, and the ease or difficulty with which an independent Scotland would achieve membership of the European Union. What is often overlooked is that the credibility of the outcome of the vote on 18 September 2014, whatever that might be, will depend greatly on the legitimacy of the referendum process itself.

Already the procedural rules for the referendum have been taking shape, with two bills introduced to the Scottish Parliament this Spring. The franchise rules for the referendum are set out in the Scottish Independence Referendum (Franchise) Bill ('the Franchise Bill'), introduced into the Scottish Parliament on 11 March and passed on 27 June. This Bill required to pass through the Scottish Parliament quickly to facilitate the registration of voters, particularly new voters since the franchise for the referendum is extended to 16 and 17 year olds. The Scottish Independence Referendum Bill ('the Referendum Bill') was introduced into the Parliament on 21 March 2013 and is expected to be passed in September 2013.

The legislation was preceded by the Edinburgh Agreement^[1] signed by the United Kingdom and Scottish Governments on 15 October 2012. This provided that the referendum should: have a clear legal base; be legislated for by the Scottish Parliament; and 'deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect'. This has been formalised by secondary legislation^[2] which devolves to the Scottish Parliament the competence to legislate for a referendum which must be held before the end of 2014.^[3]

Here are some of the main points to come out of this draft legislation:

The franchise for the referendum is the same as for Scottish Parliament elections and local government elections,^[4] mirroring the franchise used in the Scottish devolution referendum in 1997. One consequence is that EU citizens who are resident in Scotland will be able to vote in the independence referendum. A major difference of course is the provision in the Franchise Bill extending the vote to those aged 16 and older.^[5] This is a radical departure; never before have people under the age of 18 been entitled to vote in a major British election.^[6]

The Referendum Bill contains a raft of important provisions which, *inter alia*, frame the question to be put to voters. Following review by the Electoral Commission this has been set as: 'Scotland should be an independent country? Yes/No'.^[7]

The Referendum Bill also formalises a more general oversight role for the Electoral Commission. Among a number of statutory duties, the Commission is given the task of promoting public awareness and understanding in Scotland about the referendum, the referendum question, and voting in the referendum.^[8] This is likely to be a challenging role, particularly in explaining the referendum question. There is already a heated debate between the UK and Scottish Governments as to what 'independence' will mean for Scotland. In addition, many features of the post-referendum landscape will remain contingent upon negotiations between the two governments in the event of a majority Yes vote.

Efforts are made within the Referendum Bill to help ensure equality of arms between the two campaign groups. Each side in the campaign can apply to the Electoral Commission to be appointed as one of two 'Designated Organisations', and both the Yes Scotland and Better Together campaign groups have intimated their respective intention to do so. One notable feature of the Referendum Bill is that there is to be no public funding for the two Designated Organisations. Also the Referendum Bill sets a regulatory period of 16 weeks before the referendum within which regulation will take effect;^[9] these spending rules will all be overseen by the Electoral Commission.

Within the Referendum Bill there are four categories of actor entitled to spend money during the campaign period: Designated Organisations (which can each spend up to £1,500,000);^[10] political parties as 'permitted participants';^[11] other 'permitted participants' who seek to spend £10,000 or more^[12] (they have a spending limit of £150,000^[13]); and others spending less than £10,000, which means they do not require to register as permitted participants.

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Political parties as 'permitted participants' have a spending limit of either £3,000,000 multiplied by their percentage share of the vote in the Scottish Parliament election of 2011, or a minimum of £150,000. By the formula for political parties the distribution between political parties represented in the Scottish Parliament is as follows:

Scottish National Party: £1,344,000
 Scottish Labour Party: £834,000
 Scottish Conservative & Unionist Party: £396,000
 Scottish Liberal Democrats: £201,000
 Scottish Green Party: £150,000

It seems that these rules will lead to a generally level playing field in terms of expenditure within the regulatory period. For example, the total spending limit for the two pro-independence parties (SNP and Greens) is similar to that for the three unionist parties – Labour, Conservative and Liberal Democrat. But given that these spending limits only apply in the 16 weeks before the referendum, this does leave the possibility of spending differentials between the two campaigns before this period begins.

The Referendum Bill still has some way to go in its passage through the Scottish Parliament. But it is a detailed attempt to build upon the Edinburgh Agreement and to use the powers vested in the Scottish Parliament to help create the conditions for a fair, lawful and democratic referendum. A significant task for the Electoral Commission, and for academic and other observers over the next year, will be to observe how well the legislation in the Referendum Bill and Franchise Bill is implemented and how faithfully all of those engaged in referendum campaigning abide by the spirit as well as the letter of the legislation.

[1] *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, 15 October 2012, available at: <http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence>.

[2] This has now been passed by the UK Parliament: The Scotland Act 1998 (Modification of Schedule 5) Order 2013 (S.I. 2013/242).

[3] The Order in Council, para 3.

[4] Franchise Bill, section 2.

[5] Franchise Bill, section 2(1)(a).

[6] The age of 18 as the threshold for UK elections is set out in the Representation of the People Act 1983, section 1(d).

[7] Referendum Bill, section 1.

[8] Referendum Bill, section 21.

[9] Referendum Bill, Schedule 4, Part 3.

[10] Referendum Bill, Schedule 4, para 18(1).

[11] Referendum Bill, Schedule 4, para 18(1).

[12] Referendum Bill, Schedule 4, para 17.

[13] Referendum Bill, Schedule 4, para 18(1).

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